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Supreme Court of the United States

OCTOBER TERM, 1935

NO. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, and GENERAL CASUALTY COMPANY OF AMERICA, Petitioners,

vs.

ANTONIA ANELICH, as Administratrix of the Estate of Mario Anelich, Deceased, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF OF PETITIONERS

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On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF PETITIONERS

BASIS OF JURISDICTION

This is an appeal from the judgment of the Supreme Court of the State of Washington, entered October 25, 1935. Review of this judgment was sought by petition for certiorari which was granted

by this Court on February 17, 1936. The opinion of the Court below may be found as *Anelich v. The "Arizona" et al*, 49 Pac. Rep. (2d) 3, (R. 18-24).

The action is one in which rights are claimed by the respondent, the plaintiff in the court below, under the Merchant Marine Act, popularly termed "The Jones Act" (41 Stat. 1007; 48 U. S. C. A. Sec. 688).

Upon the trial of the cause, the petitioners by motion for non-suit at the close of the plaintiff's case (R. 200) and by motion for directed verdict at the close of all the evidence in the case (R. 348-351) and by motion for judgment notwithstanding the verdict (R. 13) asked for judgment in their favor upon the ground that under the provisions of the Jones Act and the Federal statutes by it made applicable to injured seamen, as construed in *Seaboard Air Line v. Horton*, 233 U. S. 492; *Delaware, etc. R. R. Co. v. Koske*, 279 U. S. 70, the plaintiff's decedent assumed the risk of injury as the injury resulted from an open, obvious hazard, incidental to his employment, and from a danger which was known to or plainly observable by him; and upon the further ground that in this action there was no proof of negligence on the part of the defendants proximately causing the injuries to plaintiff's decedent, and that a jury's verdict may not rest upon conjecture and

speculation, *Chicago M. St. P. Ry. v Coogan*, 271 U. S. 472; *New York Central R. R. Co. v. Ambrose*, 280 U. S. 486; and upon the further ground that under said Act and under the Maritime Law as laid down in *The Iroquois*, 194 U. S. 240, there was no proof of negligence in the treatment and care afforded the injured man following his injury; and upon the further ground that the verdict that the septicemia or blood poisoning resulting in death was proximately caused by the negligent treatment, if any, of the injured man rested upon guess and speculation in the face of all the medical testimony, and hence cannot be sustained, upon the authority of *Chicago, M. S. Paul Ry. v. Coogan*, and *New York Central R. R. Co. v. Ambrose, supra.*

These motions were overruled by the trial court. The instructions requested by the defendants upon assumption of risk were refused. (R. 12, 361.) The Court expressly stated that assumption of risk was not available to the defendants in this case. (R. 201.) Judgment was entered in the trial court upon the verdict of the jury against the petitioners. (R. 15.) This judgment was affirmed by the Supreme Court of the State of Washington. (R. 18-24.) Thereafter petition for rehearing was denied (R. 25) and the judgment of the Supreme Court of the State of Washington was entered.

STATEMENT OF THE CASE

Antone Mardesich was the owner and his son, Peter, was the master of the fishing vessel "Arizona' during the season of 1933. The fishing was done by purse seine in the waters of Puget Sound, Washington. Before the season began, Mario Anelich, respondent's decedent, asked and received employment on board the vessel for the season. (R. 318.) The fishing was on shares, each one of the crew of eight receiving one share and the boat and nets four shares. (R. 233-234.)

Purse Seine fishing requires a net about seventeen or eighteen hundred feet long. (R. 245.) This net is stretched or laid out in a circle in the water by leaving one end with a skiff and circling with the vessel, paying out as she goes, until the skiff is reached again. The bottom of the net is kept down by leads and the top of the net is kept on the surface by corks, strung at intervals. The effect is to form a netted fence around the spot where it is believed the fish are, seventeen or eighteen hundred feet in circumference and about one hundred and thirty or forty feet in depth. (R. 47, 229.)

Running through rings along the bottom of the net is the "purse line". One end of the purse line and of the cork line is retained in the skiff, and when

the circle is complete, they are passed on board. Then the two ends of the purse line are hauled in through blocks hanging from a davit on the side of the vessel, the line sliding through the rings at the bottom of the net and pulling the bottom together the same way as the opening in a tobacco pouch or money sack is closed by pulling the ends of the pouch strings. When the pursing or closing is complete, enclosing the fish from below as well as on all sides, hauling of the purse line is continued until the rings are brought to the surface within reach of the men on board the vessel. Then a bridle or strap is placed around the net and rings, the block and tackle from the boom or derrick on the vessel is hooked into the strap, and the rings and net are thereby lifted still higher. The cork line is then pulled in by hand so that the top and bottom of the net are both on board and the fish are captured. The net is then pulled on board, a little at a time. (R. 47-49; 229-231.)

On board the vessel, about amidships, and about the same distance from the bow and stern, directly aft of the boom or derrick, is a winch having two drums. When the purse line is to be hauled in, one end is taken about each drum three or four turns, and by pulling on the slack ends of their respective lines, the two winchmen, winch tenders, create friction on the revolving drum sufficient to cause the

line to come in, or ease off, causing it to stop coming in, as they wish. As the line comes in the winchmen coil it behind them. When the rings are up the winch is stopped by the engineers below (R. 231), and the winchmen hold the weight of the net and rings while the strap is put around the net and the tackle from the boom hooked on. Then the weight of the net and rings is taken on that tackle and held, by twisting the rope in the tackle together, while the purse lines are removed from the winch drums and the line from the boom is taken around the forward drum to secure power to raise the net still higher. The engine starts. The winchmen, having cleared the purse lines from the drums, cross to the davit and remove the purse lines from the blocks there so that there will be no fouling of lines as the net goes on higher. (R. 230-231.)

The whole operation of laying out and pulling in the net is called "making a set." Each member of the crew had definite duties and a set was always made in the same way. The operation had been performed about 150 times during the season from the time the season opened on June 27, up until August 1. (R. 234-235, 293, 307.)

Mario Anelich, respondent's decedent, was an experienced fisherman and had followed that work for many years. At one time he had owned his own boat.

(R. 77, 78, 234, 306, 318.) The season before he had worked on the winch on another vessel (R. 306), and during the 1933 season he was assigned the same job on the stern drum of the winch of the "Arizona." (R. 234, 306.)

As winchman he was in charge of the stern drum and of the end of the purse line hauled in by it. George Brajcich had the same job on the forward drum. When the net was laid out, Anelich and Brajcich each took his respective purse line several turns around his drum, and proceeded to haul in until the rings came up. Then they held the net until the weight was taken on the boom, and then cleared the purse lines from the drums and from the davit blocks. Throughout the whole operation the winchmen were in complete control of their respective purse lines. No one handled the line on the rear of the winch except Anelich. (R. 235, 295, 309.) The winch drum revolved at a constant speed of about 90 R.P.M. (R. 249.)

On August 1, about 8:30 A. M., the "Arizona" was fishing along the western shore of San Juan Island in Puget Sound. It was a calm, sunny morning. The crew was proceeding with the usual routine and the first set of the morning was almost completed. (R. 235.) George Ruiancich was in the skiff at the stern of the boat and Pete Matiaco, Mike Swalko

and Jack Marincovich were in the stern of the "Arizona" pulling in the cork line and the lines at the end of the net. (R. 305, 306, 312, 314, 315.) The purse line had been pulled in by the winch and the rings had come to the surface. Peter Mardesich slipped the choker or strap around the rings and hooked in the block and tackle from the boot, then twisted the block and tackle so that it would not slip, thus holding the weight of the net and rings. (R. 231.) George Brajcich and Mario Anelich slackened away on the purse line *on which there was no longer weight* and George Brajcich cleared his purse line away from the forward drum. (R. 294.) Antone Mardesich, the owner, who was on the boat for his health only, because of his bad heart (R. 57, 195, 299), decided to lend a hand and took the line from the boom the necessary turns about the forward drum to continue raising the net. (R. 119, 81, 299.) As soon as he had done so, Peter Mardesich allowed the block and tackle to untwist and the net continued to rise. (R. 48, 236, 294, 307.) Peter Mardesich moved back toward the stern of the boat, clear of the net and rings and the heavy leads, which totalled a weight of a ton and a half. (R. 236.) George Brajcich moved over to the davit, directly under the ascending net, to slip his purse line out of the block on the davit. (R. 284.)

Meanwhile, it was the duty of Mario Anelich, plaintiff's decedent, to clear his purse line away from the drum as Brajcich had done and to cross to the davit and clear the block there. (R. 295.) The first intimation that any member of the crew had that he was not doing so was had by Pete Matiaco, who glanced up from his work and saw that Anelich's purse line was tangled, saw Anelich jump, either to avoid it or to attempt to straighten it, saw his left leg become entangled in the twisting and snarling line and saw his leg go over the winch (R. 312.) Anelich shouted in Slavonian, "Mother of mine, my leg is caught—my leg is broken." (R. 243.) Peter Mardesich, about ten feet aft, jumped for the handle of the winch clutch, of which we shall speak more fully hereafter, and found himself entangled in the twisting coils of the purse line. (R. 236.) By the time he got himself free, the winch was stopped by the engineer who was at his post below, and who had been warned by the shouts of Anelich, of Peter Mardesich and of the other members of the crew. (R. 87, 188, 230, 300, 308.) George Brajcich, who was at the davit, turned, seized an axe which was standing against the cabin nearby, and cut Anelich loose by cutting the snarls of the purse line which bound him to the winch drum. (R. 237, 284, 295.) Antone Mardesich, with the ton and a half weight of

the nets and leads suspended above Brajcich and above the boy in the skiff (R. 252), with no way to hold this weight when the winch was thrown out of gear, bound the line he was holding about the framework or bitt of the winch and so held the weight. (R. 81, 86.)

Members of the crew removed Anelich's boot and it was obvious that his leg was badly broken. (R. 308, 313.) George Brajcich applied a tourniquet of rope around his leg above the knee (R. 296, 308) and the men laid Anelich on the deck. Meanwhile, Peter Mardesich, realizing that the "Arizona" could not be moved because of the long line of corks which completely surrounded the vessel and which made it impossible for the "Arizona" to operate her propeller or for any other vessel to come alongside without fouling its propeller and disabling the vessel (R. 237, 316), whistled to the nearest boat for help. (R. 237.) The "Congress" nearby responded and Anelich was immediately transferred to the "Congress" by means of the skiff. (R. 238, 313.) Before the "Congress" got under way, however, Mardesich saw the "Excel II", a fish buyer and a much faster boat than either the "Congress" or the "Arizona," and directed that Anelich be transferred to the "Excel II' and taken to the nearest doctor at once. (R. 317.) Anelich had already been placed on a mattress

on board the "Congress." The "Excel II" came alongside and he was transferred, mattress and all, to the faster boat. (R. 254.) The "Excel II" then proceeded at top speed around the island to Friday Harbor, the nearest medical attention. The crew of another boat assisted that of the "Arizona" in raising her net as quickly as possible, and the "Arizona" proceeded directly to Friday Harbor. (R. 238.)

Meanwhile, on the "Excel II" Lee Mackovich, head buyer for the corporation to which all the fishing vessels sold their fish, and an old friend of Anelich's, had directed the captain of the "Excel II" to proceed with all possible speed to Friday Harbor and had jumped off a float at Michell Bay, about 15 minutes run from where the boats had been fishing. There he went ashore, walked a quarter of a mile to the nearest telephone, and placed a telephone call to his home office in Everett, Washington, upon the mainland, directing them to call the Coast Guard cutter to pick up Anelich and remove him to the Marine Hospital in Seattle. Mr. Mackovich reached a telephone and placed his call at 9:40 A. M. The home office got in touch with the Coast Guard at Port Townsend, by telephone, at 10 o'clock and notified them that an injured man from a fishing vessel should be picked up and transferred to Seattle to the Marine Hospital at once. (R. 254, 256, 280, 281, 288,

322.) Throughout the trip the injured man was attended by Edward Stevens, who did everything to make him comfortable. (R. 275.)

At about 10:30 the "Excel II" arrived in Friday Harbor and Dr. Sturdevant was called to the dock. He went on board and examined the wound to determine its nature and extent, cutting away the clothing and exposing it for the first time. He then bandaged it hastily and transported the injured man to his office where he did the necessary work of cutting away the torn and dead tissue, sewing up torn muscles and the skin and bandaging the wound. He made no effort to set the broken bone: medical practice requires a delay to allow for recovery from shock before that painful job is begun. (R. 132 *et seq*, 258 *et seq.*)

Meanwhile, the "Arizona" had stopped at Mitchell Bay, where her master and owners were informed that the Coast Guard had been called (R. 84); upon reaching Friday Harbor, they received the same assurance and were told that the Coast Guard cutter would arrive at noon. (R. 84.) When the cutter did not arrive, Peter Mardesich called the Coast Guard again at 12:55 P. M. Standard Time (R. 85, 239, 281), and Dr. Sturdevant called at 1:08 Standard Time. (R. 281.) The cutter arrived at about five o'clock (R. 264) and picked up Mr. Anelich, trans-

porting him to Seattle where he was taken ashore to the Marine Hospital at 10:45 that evening. He was placed in bed and no operative measures of any kind were taken until nine o'clock the following morning; the customary and standard treatment of such cases, when the wound has been cleansed and repaired as had been done at Friday Harbor, is to make the injured man as comfortable as possible to permit recovery from the shock. (R. 166, 152.) The next morning the leg was set with good results. Two or three days later Systemic infection developed. (R. 154.) Had septicemia or blood poisoning not developed, he would have recovered and had a fairly useable leg. (R. 158.) Due to the septicemia his condition steadily grew worse and on August 8, 1933, a week after the injury, he died.

These facts are stated at length because it is essential that this Court have before it the complete picture of the work on the fishing boat, as well as a definite idea as to what point in the operation had been reached when this accident occurred. Confusion in times may arise from reading the record because Friday Harbor and the mainland were operating on Daylight Saving Time, while the fishermen, because of tides, were on Standard. (R. 141.)

Considerable reference will be made to a clutch lever on the starboard side of the winch, between the

two drums, by which the clutch of the winch was engaged and disengaged from the main drive shaft. The winchmen stood on the starboard side of the winch, Brajcich slightly forward and Anelich slightly aft of the winch (R. 55, 86). Attached to the winch by a string hung a forked stick, designed to be placed behind the clutch handle to hold it out, in engagement, when the winch was to be used for some little time in stormy weather or without a heavy load (R. 209, 240, 291, 298); it was never used when there was a load, such as the purse line, on the winch and *it was not in place on the day in question*, according to the testimony of the members of the crew (R. 88, 236, 296). The clutch consisted merely of two square steel jaws, one of which slid into mesh with the other, and if run for a time without a load, would naturally tend to shake apart and disengage. The evidence as to the condition of the clutch was in conflict; considerable testimony was given as to its worn condition, which plaintiff contended would not allow the winch to operate without some means of actually holding it in engagement (R. 106, 130, 337). The members of the crew, as well as mechanics who had examined and tested the clutch, testified that nothing was used or needed to keep the clutch in gear while the winch was loaded (R. 236, 296, 193, 206, 221, 291, 88), and that the clutch, while not a

new one, was in good working condition (R. 193, 206, 221).

Such are the material facts of the case.

The pleadings and the rulings of the courts on the trial and appeal of the case are set forth in the petition for certiorari under heading "A", and in the interest of brevity will not be repeated here.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Washington erred in holding that the defense of assumption of risk was not available to the defendants in this action.

2. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligence proximately causing Anelich's injury to sustain the verdict of the jury.

3. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligent care and treatment to sustain the jury's verdict.

4. The Supreme Court of Washington erred in failing and refusing to hold that there was no evidence upon which the jury could find that the negligent care and treatment, if any, was the proximate cause of the disease causing the death of Anelich.

ARGUMENT

I.

A

ASSUMPTION OF RISK IS AN AVAILABLE DEFENSE TO THE PETITIONERS.

1. The Law

This action is one for an alleged tort which occurred at sea. These facts alone concededly bring the case within the jurisdiction of the courts of admiralty administering what has come to be known as the Maritime Law, and in absence of statutory enactment, the remedy of the injured person would rest on the Maritime Law alone. In absence of legislation, this action could not be maintained, since the Maritime Law afforded no cause of action for wrongful death. Death of the seaman ended not only his litigation, but that of his heirs on his behalf. *Lindgren v. U. S.*, 281 U. S. 38, 50 Sup. Ct. 207, 74 L. Ed. 686, (1929).

"Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this sugestion is that the prior maritime law, as herein-

above stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175 on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election,'—which appear in the first clause of Sec. 33 of the Marchant Marine Act, relating to the personal right of action of an injured seaman and, as held in *Pacific Co. v. Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election between the right under the new rules to recover compensatory damages for injuries caused by negligence, and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

Respondent relies, then, in bringing this action upon the Merchant Marine Act—herein referred to, for brevity, as the Jones Act. 41 Stat. 1007, 48

U. S. C. A. 688. The relevant portions thereof are as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees, shall apply; and in case of the death of any seaman as the result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable * * *"

The statutes referred to are the relevant portions of what is known as the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. A. 51-59, which provide in short—

1. That an employee of a common carrier by railroad, or in case of his death his personal representative, may recover damages for injuries or death resulting wholly or in part from the negligence of any of the employees of such common carrier, or by reason of any defect or insufficiency in equipment due to the employer's neglect;

2. That the contributory negligence of the employee shall not bar his recovery but shall work a proportionate diminution of damages.

3. That the employee shall not be held to have assumed the risk where violation by the employer of a safety statute contributed to the injuries; and

4. That the defense of fellow servant is abolished.

No. 3 is our immediate concern. Under it, this court has made definite the law applicable to railway employees; in all cases save where a Federal safety statute has been violated, assumption of risk exists as a defense as at common law. The law was stated in *Seaboard Air Line R. R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475 1914, as follows:

"Some employments are necessarily fraught with danger to the workman; danger that must be and is confronted in the line of duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. *But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*" (Italics ours.)

The law was further stated in *Toledo St. Louis and W. R. R. v. Allen*, 276 U. S. 165, 169, 72 L. Ed. 513, 48 S. Ct. 215 (1928).

"This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of the defendant, *Seaboard Airline v. Horton*, 233 U. S. 492, 502, and, except as specified in Sec. 4 of the Act, the employee assumes the ordinary risks of his employment and, *when obvious or fully known or appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees* (citing cases). If, upon examination of the records, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed." (Italics ours.)

To the same effect are the later cases of *Delaware etc. R. R. Co. v. Koske*, 279 U. S. 7, 73, L. Ed. 578, 49 S. Ct. 202 (1929); *Chesapeake & Ohio R. R. Co. v. Kuhn*, 284 U S. 44, 76 L. Ed. 157, 52 S. Ct. 66 (1931); *Northwestern Pacific Ry. Co. v. Bobo*, 290 U. S. 499, 54 S. Ct. 263, 78 L. Ed. 462 (1932).

In its opinion the Court below makes reference to *The Osceola*, 189 U. S. 158, as supporting its statement as to the general maritime law. In *The Osceola* were stated certain definite propositions of maritime law which could be regarded as settled, but the Court did not undertake to state all the principles of maritime law governing personal injuries to seamen. Contributory negligence has always been regarded in

admiralty as a defense, in part, at least, (*The Max Morris*, 137 U. S. 1) yet there is no mention of it in *The Osceola*. Assumption of risk is regarded as peculiarly applicable to seamen, in *The Iroquois* 194 U. S. 240, and there is likewise no mention of it in *The Osceola*. The language used by this Court is clear cut and definite and should not be construed as an attempt to cover the whole field of maritime torts in four short propositions.

Moreover, as pointed out in *Lindgren v. U. S.*, *supra*, this is a situation in which *The Osceola* is not applicable. That decision was dealing solely with the rights of an injured seaman; and by the admiralty law his personal representatives, upon his death, had no cause of action against the master of the vessel. The cause of action which the seaman had, based upon unseaworthiness, died with him.

By the Jones Act, Anelich's personal representatives, he having died as the result of his personal injuries, may maintain an action for damages at law, the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees is applicable.

The right of action thus asserted is identical, conferred by the same section of the Act of Congress,

with that which a railway employee's personal representative might assert; it is for alleged *negligence* on the part of the employer contributing proximately to the employee's injury. Petitioners cannot see any slightest basis for a distinction between the rights of the personal representatives of a railway employee and of a seaman. The former is given a right of action, which he may exercise under certain conditions; the latter, once utterly without remedy, is given the same right as the former, by virtue of the same statute, which he may exercise under the same conditions.

We are not urging that the respondent's right here are in any degree different than Anelich's would have been had he lived; it is absurd to suppose that Congress intended the Jones Act to confer a different right to be exercised under different conditions by the living seaman, than by his personal representatives after his death. The Jones Act gave to his personal representative the identical right possessed by representatives of a railway employee; and it is our position that it also gave to the seaman himself the same rights, to be exercised to the same extent, of a railway employee. Assumption of risk, a common law defense to an action at law for negligence, is available to the employer of railway employees; and it is equally available to the employers of seaman when

an action at law is brought for damages, for negligence under the Jones Act.

The pronouncements of this Court regarding the Jones Act indicate that this is the proper interpretation of the enactment. In *Panama Ry. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391, (1923) in which the constitutionality of the statute was attacked and upheld, it was stated that by it the rules of the common law system are brought into and made a part of the Maritime system.

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified and not between that law and some non-maritime system.

"The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come alogether from their inclusion in the maritime law. *Louisville & N. R. Ry. Co. v. Western Union Telegraph Co.*, 237 U. S. 300, 303. True, they are not in so many words made a part of that law; but our express declarations is not essential to make them such. As originally enacted, Section 20 was part of an act the declared purpose of which was 'to promote the welfare of American seamen.' It then provided that in suits to recover damages for personal injury 'seamen having command shall not be

held to be fellow servants with those under their authority,' and in *Chelentes v. Luckenbach S. S. Co.*, (*supra*), this Court treated it as part of the maritime law, but held it did not disclose a purpose ' to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes of employers in respect of their employees on shore.' After that decision the section was reenacted in the amended form hereinbefore set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' In that form it makes applicable to personal injuries suffered by seamen in the course of their employment all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employes.' Thus its origin, environment, and subject matter show that it is intended to and does, bring the rules to which it refers into the maritime law * * *"

The distinction drawn between Section 20 as originally enacted as part of an act to promote welfare of seamen and not intended to "impose upon ship owners the same measure of liability for injuries suffered by the crew at sea as the common law prescribes" for shore employers, and the act as it now reads, is clear cut. The measure of liability upon ship owners and railway employers is the same. Respondent's action is based upon negligence, a common law concept, a common law breach of duty, brought into the Maritime Law.

"Here the complaint contains an affirmative averment of negligence in respect to the appliance, and,

having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, instead of invoking, as he might, the relief accorded to him by the old Maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under Section 3 of the Employer's Liability Act, subjects himself to a reduction of damages in proportion to any contributory negligence on his part." *Engel v. Davenport*, 271 U. S. 33, 70 L. Ed. 813, 46 S. Ct. 410 (1926).

If the seaman must assume the burden of proving negligence and subjects himself under Section 53 to the defense of contributory negligence, there seems no logical reason why, under Section 54, he does not assume the risk, a common law defense to the common law right he seeks to assert.

This language is carried on in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 138, 73 L. Ed. 220, 49 S. Ct. 75 (1928), as follows:

"The right to recover compensatory damages under the new rules for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. * * *"

"And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; * * *"

The latest expression of this Court, *Warner v. Goltra*, 293 U. S., 155, 55 S. Ct. 46, 79 L. Ed. 8 (1935), indicates nothing to the contrary. New rights are given to the seamen, and with these rights, as an integral part of them, are certain disabilities; the "new rules" are those of the common law.

The continued use by certain courts of the term "unseaworthiness" in decisions of cases arising under the Jones Act seems unexplainable; negligence is the only proper term, and unless the seaman is "invoking, as he might, the relief accorded to him by the old Maritime rules," unseaworthiness is not a true part of the picture. We find, however, certain courts, particularly the Second Circuit, stating, in actions brought under the Jones Act, that as to any unseaworthiness or defective conditions of the vessel or equipment, there can be no defense of assumption of risk. *Grimberg v. Admiral Oriental S. S. Line* 300 Fed. 619, (Dis. Ct. Wash.) (1924); *Ives v. U. S.*, 58 Fed. (2d) 201, (C. C. A. 2) (1932).

The majority of courts when confronted with cases under the Jones Act, properly have treated the question of assumption of risk as though common law negligence and its defense, as modified by the Federal Employer's Liability Act, were alone involved.

In re Luckenbach S. S. Co., 16 Fed. (2) 168, 171 (C C. A. 1925), involved a defective winch which gave way, injuring plaintiff, and the Court said that the risk was not assumed as the plaintiff knew nothing of the defect; but there was no intimation that the defense would be inapplicable merely because the vessel was unseaworthy.

In *Peterson v. Sanford Tug Co.*, 28 Fed. (2) 283, (D. C., N. Y. 1928), a seaman, suing under the Jones Act, moved to strike the defense of assumption of risk. The Court denied the motion, in the following language:

"Manifestly, however, the seamen still assumes the ordinary risks of his employment and also those which are obviously or fully known or appreciated, just as the employee of a common carrier would assume certain risks of his employment. *Toledo, Etc., R. R. Co. v. Allen*, 276 U. S. 165, 168, 169."

And in *The Ipswich*, 46 Fed. (2) 136 (D. C., Md., 1930), involving an injury to a seaman due to an alleged defective condition of an engine room, recovery was denied because of the assumption of risk, as follows:

"It is, of course, the law that the employer exercise due care to furnish a safe place to work and that a breach of this duty ordinarily gives the injured employee a right of action, but it is equally the law laid down by the Supreme Court of the United States that if the employer neglects this duty and the defect and risk involved in the neglect are obvious to an ordinarily prudent person under the circumstances, and would be observed and appreciated by such person, he assumes the risk, even though it flows from the neglect of duty. *Southern Ry. Co. v. Hermans* (C. C. A., 4th Circuit), 44 Fed. (2) 366, Decided October 21, 1930. * * * He was not acting under the compulsion of an order from a superior officer, which, under some circumstances, prevents the application of the doctrine of assumption of risk."

The Circuit Court for the 3rd Circuit, in *M. J. McCahan Sugar, Etc., Co. v. Stoffel*, 41 Fed. (2) 651 (1930), in a suit in admiralty under the Jones Act, stated the law, based on decisions in railway cases, to be as follows:

"An employee assumes the risks normally and necessarily incident to his employment, and also the extraordinary risks caused by his master's negligence; yet he assumes the latter only when they are obvious or fully known by him and are such as would be, under the circumstances, seen and appreciated by an ordinarily prudent person."

In *The Richelieu*, or *Cronec v. Ohio R. Co.*, 48 Fed. (2) 497 (C. C. A. 4, 1931), Cert. Den. 279 U. S. 864, it was contended that stevedores assumed the risk of injury from explosive substances in the hold. The Court decided, on common law principles and citing

railway cases, that the risk was not open, obvious, and appreciated and so not assumed. A similar holding is *The Calvert*, 51 Fed. (2) 494 (C. C. A., Md., 1931), and in neither case is it hinted that maritime assumption of risk differs in any respect from that defense at common law. And in *The Zealand*, 49 Fed. (2) 781 (D. C., N. Y. 1931), assumption of risk of injury from faulty rigging was discussed and decided upon the principles set forth in *Delaware, Etc., R. R. Co. v. Koske* (*supra*), 279 U. S. 7, 73 L. Ed. 578, 49 S. Ct. 202.

Stevens v. O'Brien & Company, 62 Fed. (2) 633, (C. C. A., Mass. 1933), presented a situation similar to the present case. The plaintiff was a seaman on defendant's fishing vessel and alleged injuries due to the vessel's unseaworthy condition. The Court below directed a verdict in the defendant's favor on the basis of assumption of risk. The defense had not been pleaded. The Circuit Court, pointing out that the action was under the Jones Act, held that the defense must be pleaded to be available, and although the defense certainly existed, yet the case must be retried to give the plaintiff an opportunity to prepare to meet the proof of assumption of risk if he could do so.

The Cricket, 71 Fed. (2) 261 (C. C. A. 9,1934) held that a heavy sea, which carried away a ladder

to which a seaman was clinging, was one of the many risks assumed by him as incidental to the hard life of a seaman. A similar case is *Maloney v. U. S.*, 7 Fed. Supp. 14, (D. C., N. Y. 1927).

The Circuit Court of the 4th Circuit, in *Southern Ry. Co. v. Hermans*, 44 Fed. (2) 366 (1930), held that the defense existed under circumstances very similar to the instant case. The decedent was a deckhand on defendant's tug, handling certain lines; and while so doing he placed himself in a position, which, due to the peculiar construction of the tug, and defendant's failure to have a lookout, was dangerous and resulted in his death. The Court stated:

"The most difficult question is whether the defendant should have been given a verdict under the doctrine of assumption or risk. * * * Congress by its action has retained the doctrine as a defense available to employers in cases of this sort. * * * (Referring to the Jones and Liability Acts.) The Supreme Court has held that Congress, by eliminating the defense of assumption of risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action. Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 508. There is no claim in this case of violation of any statute and hence the ordinary common law rule must be given effect. In the cited case, the Supreme Court defined the rule and held that it applies in cases under the Federal Employer's Liability Act, even though the master has been guilty of negligence (quoting from the Seaboard case)."

"It must be borne in mind that the negligence charged by the plaintiff, to-wit, the defendant's failure to have a proper lookout, was not a new or unusual circumstance, but characterized the performance of the men on countless previous occasions where the deceased took part, and also that the risks ordinarily attendant thereon, including contact between the vessels as they approached, were obvious to the deceased. Hence there were strong reasons for a directed verdict for the defendant, unless it should appear that some unusual circumstances took place, or some unexpected danger was encountered on the occasion of the injury. * * * The jury should have been explicitly told that even if they found negligence on the part of the captain, still the plaintiff could not recover if Hermans clearly understood the risks attendant upon such negligence and voluntarily assumed them."

State Courts have likewise applied the common law rule of assumption of risk to actions involving maritime torts. The early case of *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 588 (1892) held that a fisherman on a fishing schooner assumed the risk of injury when a defective windlass jammed, as the condition of the windlass was obvious to an experienced seaman such as the plaintiff was shown to be. In a suit under the Jones Act, *Russell v. Pere Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930, Cert. Den. 279 U. S. 864), the Michigan Court took the position that the suit was under the Liability Act, made applicable by the Jones Act and stated the doctrine of assumed risk as being the same as in railway cases.

The Ohio Court of Appeals took the same stand in *Patterson v. Cleveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N E 592 (1930), in which a seaman claimed a valve in a gangway across an engine, over which he fell, rendered working conditions unsafe and the vessel unseaworthy The Court stated:

"Assuming for the sake of argument that there was duty on the owner to give warning of the existence of the release valve, we are of the opinion that the plaintiff assumed the risk incidental to his employment; that under the circumstances related in the evidence, the existence of the release valve was an obvious risk which, under the Federal Employer's Liability Act, the employee assumed."

And in *Zigler v. Alaska-Portland Packers Assoc.*, 135 Ore. 359, 296 Pac. 38 (1931), an action under the Jones Act, an instruction in part as follows was approved by the Court:

"A man in accepting employment assumes the risks that are usually and ordinarily incident to that kind of work, or such dangers and risks and hazards as are open and obvious to a man of ordinary intelligence and powers of observation."

The State of Washington, prior to the latest decision in this case, had in many cases permitted to the employer of seamen or of other maritime workers the defense of assumption of risk, both before and after the passing of the Jones Act. *Lundgren v. Pacific Coast S. S. Co.*, 103 Wash. 81, 173 Pac. 1023; *Hamre v. Rothschild & Co.*, 136 Wash. 522, 240 Pac. 909

(1925); *Kahlstrom v. International Stevedoring Co.*, 141 Wash. 374, 250 Pac. 287 (1926); *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113, (1928); *Schotis v. North Coast Stevedoring Co.*, 163 Wash. 305, 320, 1 Pac. (2) 221 (1931), and cases cited.

Assumption of risk is and always has been a maritime defense; that is conceded by respondent and must be. In *The Iroquois*, 194 U. S. 240, 48 L. Ed. 957, 24 S. Ct. 640 (1903), this Court said of a case involving a seaman who fell while trimming a sail:

"A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to happen, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risks, is peculiarly applicable to the case of seamen."

To the same effect is 24 R. C. L. 1171, *The Cricket*, 71 Fed. (2d) 261, C. C. A. 9, (1934); *Maloney v.* U. S. 7, Fed. Sup. 14.

Nor is this confined merely to risks of heavy seas or of falling from aloft, but has been applied in many cases prior to the Jones Act which involved unseaworthy condition of ships or appliances.

In the early case of *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889), a suit in admiralty by a longshoreman claiming that a winch on board a vessel was

defective, the Court decided the cases on common law principles and held that "no recovery could be had where the workman voluntarily takes work upon machinery knowing its dangers, and not expecting or relying on any change to be made in it." On similar facts, involving dangerous old style machinery, the Circuit Court of the 4th Circuit reached the same result. *The Serapis*, 51 Fed. 91 (1892). And that same year, the South District Court of New York in *The Luckenbach*, 53 Fed 662, stated, in regard to a claimed negligent condition of a door, as follows:

"I should have found great difficulty in allowing any recovery, as the hatchway and all the arrangements of the room were in no respect out of order, but in the exact condition they were when the libellant engaged work and were physically known to him. The Maharajah, 40 Fed. 184. Aff. 1 U. S. App. 20; Railroad Co. v. McDave, 125 U. S. 564, The Serapis, 51 Fed. 91."

The Saratoga, 94 Fed. 221 (C. C. A. 2, 1899) involved an injury occurring while an unlighted vessel was being loaded at night. The Court said:

"So far as the crew, and the regular gang of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were advised, they took their risk. This has been held so many times that it is unnecessary to cite authorities."

And the Circuit Court of the 3rd Circuit stated that common law principles applied in a suit in admiralty for the death of a stevedore aboard ship in *Jeffries v. DeHart*, 102 Fed. 765 (1900).

The clearest discussion of maritime assumption of risk prior to the Jones Act is found in *The Seandinavia*, 156 Fed. 403 (D. C., Me., 1907). The libellant, a fireman on a tug boat, used a ladder which he knew was defective. After pointing out that a seaman acting in obedience to orders does not assume risks involved in so obeying, the Court referred to *The Max Morris*, 28 Fed. 881, in which contributory negligence was held not to bar recovery, and went on as follows:

"The language of the decision shows that the Court did not intend to ignore the recognized features of the law of negligence, nor to disregard the accepted doctrine of assumption of risk. Such intention is not shown in the decisions of the higher Federal Court. In the Dredge case, 134 Fed. 161, the Circuit Court of Appeals of this Circuit refused to apply the doctrine of Davies v. Mann, in a maritime case, but did not intimate that the principles pertaining to assumption of risk ond other well recognized principles of negligence are to be overridden in a court of admiralty. * * * As in the Serapis, supra, if he had taken care he could have used the appliance safely. He knew the ladder better than anyone else, and assumed the risk of its use. His negligence was the immediate and proximate cause of the injury. (Citing cases.)"

Globe S. S. Co. v. Moss, 245 Fed. 54 (C. C. A., Mich. 1917, Cert. Den. 245 U. S. 663) involved a libel in admiralty in which the libellant was injured while attempting to start a defective pump which rendered the vessel unseaworthy. The court applied common law principles to the situation, and discussed assumption of risk on that basis; finding that the risk was not appreciated or knowingly assumed by the libellant, recovery was allowed. In *Cunard S. S. C. v. Smith*, 255 Fed. 846, 849 (C. C. A., 2, 1918), a stevedore working in a hold was held to have assumed the risk of being hit by a load while working short-handed, on the authority of *Butler v. Frazee*, 211 U. S. 454, 467, 29 S. Ct. 136, 83 L. Ed. 288, a leading common law decision on the doctrine of assumption of risk.

Petitioners concede that when a seaman is *ordered* by his superior officer to use defective equipment, and that order is the impelling force causing such use, there is no assumption of the risk of danger from such use. At sea, as ashore, the force of the command deprives the servant's act of the voluntary character which they must have if the risk is to be voluntarily and freely assumed. *Panama Ry. Co. v. Johnson*, 289 Fed. 964 (C. C. A. 2, 1923). As is said in 4 Labatt, Master & Servant, (2nd Ed.) p. 3935, an employee "is not bound to set his own judgment, at his peril, above that of his superior."

Especially is this so of seamen, who are under a sterner duty to obey, by the rigidly enforced regulations of the sea, than are shore employees. As was said in *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187 32 N. E. 66 (1892), where a seaman was commanded to use obviously dangerous machinery:

"He had to choose between present punishment with a possible hope of remote justification, and customary obedience with the hope that by care he would escape injury."

To the extent that a seaman is under a greater and more pressing duty to obey than is a landsman, the defense of assumption of risk is different at sea than on land; exactly in the same way, because of the isolation and the other peculiar circumstances relating to master and crew while at sea, there is a far greater duty upon the master to protect and care for the seaman than there is upon any shore employer. *Warner v. Goltra*, 293 U. S. 155, *supra.* While acting under orders, which he cannot disobey without punishment, the seaman voluntarily assumes no risks from defective equipment or unseaworthy condition.

There are many federal cases which have expressed this position, and have denied the application of the defense because of the order which was the impelling force of the seaman's act.

LaFourche Packet Co. v. Henderson, 94 Fed. 871 (C. C. A. 5, 1899); *Coast S. S. Co. v. Brady*, 8 Fed. (2) 16 (C. C. A., Ala. 1925, Cert. Den. 269 U. S. 578); *U. S., Etc., Corp. v. O'Shea*, 5 Fed. (2) 123, (App. D. C. 1925); *Masjulis v. U. S., Etc., Corp.*, 31 Fed. (2) 284 (C. C. A., 2, 1929); *U. S. v. Boykin*, 49 Fed. (2) 762 (C. C. A., Fla. 1931); *Hanson v. Luckenbach S. S. C.*, Fed. (2) 457 (C. C. A., 2, 1933); *Johnson v. U. S.*, 7 Fed. Supp. 133 (D. C., N. Y. 1934); *Lejeune v. General Pet. Corp.*, 72 Cal. App. Dec. 50, 18 P. (2) 429 (1932). In *States S. S. Co. v. Berglann*, 41 Fed. (2) 456 (Cert. Den. 282 U. S. 868; C. C. A. 9, 1930), the Court stated that a seaman did not assume the risk created by failure to provide lifelines during a storm; it was said that a seaman assumed all ordinary risks of his employment, but that the defense, in view of his enforced obedience and his inability to quit the ship, did not bar recovery for negligent acts on the part of his superior. The element of coercion is stressed.

Other courts have denied the defense in broad language which has given rise to contradiction in the decisions; in cases involving a direct order to do the thing which he was doing when injured, too often it has been said that there can be no defense of assumption of risk by a seaman, without adding the qualification which is implied by the facts in each

case, *"when acting under orders."* Into this class of cases fall the following: *The Colusa*, 248 Fed. 21 (C. A. A. 9, 1918); *Cricket S. S. Co. v. Parry*, 263 Fed. 523 (C. C. A., N. Y. 1920, Cert. Den. 252 U. S. 580); *Panama R. R. Co. v. Johnson*, 289 Fed. 964, (C. C. A., N. Y. 1923); *Zinnel v. U. S., Etc., Corp.*, 10 Fed. (2) 47 (C. C. A., N. Y. 1925); *McGeorge v. Chas. Nelson Co.*, 107 Cal. App. 148, 290 Pac. 15 (1930); *The Mangore*, 1 Fed. Supp. 138 (D. C., Md. 1932).

The first four cases just cited are cited oftener than any others for the general statement that a seaman does not assume the risk of unseaworthiness; and in each, as pointed out, the statement is dicta.

Some seven Federal cases have flatly stated that a seaman does not assume the risk of unseaworthy conditions, even in absence of a direct order to the seaman to use the defective device or conditions. Perhaps there are more which have escaped counsel's diligent search, but an honest and thorough effort has been made to present all of them.

One such case is *Grimberg v. Admiral Oriental S. S. Co.*, 300 Fed. 619 (D. C., Wash. 1924). In support of this decision the Court cites only the case of *Cricket S. S. Co. v. Parry* (*supra*), which was not decided under the Jones Act, and which was intended only to state

that seamen did not assume the risk of injury *while acting in obedience to an order.* (*see Scheffler v. Moran Towing & Transport Corp.*, 68 Fed. (2) 11 (C. C. A., N. Y. 1933). In the *Grimberg* case, further, there apparently was no showing that the seaman had any knowledge of the misplaced iron bar over which he stumbled, and the defect, therefore, was not an obvious one. Another of the seven cases is *Pittsburgh S. S. Co. v. Palo*, 64 Fed. (2) 198 (C. C. A., Ohio 1933) in which there was no evidence of negligence on the part of the defendant; the Court, by way of dicta, recognized the split of authority herein being discussed, and decided on the authority of *Chelentis v. Luckenbach*, 247 U. S. 372, 384, which arose before the Jones Act was enacted, that the Jones Act gave to the seaman a new right without giving any new defenses to his employer, and stated the broad rule as set forth in the *Cricket S. S. Co.* case.

The recent case of the *New Berne*, 80 Fed. (2) 244 (C. C. A., 4, 1935) is contrary to that circuit's prior decision in *Southern Ry. Co. v. Hermans*, 44 Fed. (2) 366 (1930), and, it is submitted, misinterprets the effect of the Jones Act; new rights and new regulations and conditions of those rights were given to the seaman's personal representatives by the Jones Act, and the Act does not merely constitute a regulation of the rights which they already had; they had none.

The other four cases referred to are *Storgaard v. France & Canada S. S. Corp.*, 263 Fed. 545 (C. C. A., 2, 1920; Cert. Den. 252 U. S. 585), which arose before the passing of the Jones Act; *Grant v. U. S. Etc., Corp.*, 22 Fed. (2) 488 (C. C. A., 2, 1927); *Howarth v. U. S. Etc., Corp.*, 24 Fed. (2) 374 (C. C. A., 2, 1928); and *Ives v. U. S.*, 58 Fed. (2) (C. C. A., 2, 1932).

The *Grant* case is indicative of the tenor of these decisions. Quoting:

"In respect to the defense of assumption of risk, no more need be said than that a ship owner cannot avoid liability for injury to a seaman by a defective appliance on the ground that the seaman knew of the defect."

and the only cases cited in support of that statement are cases in which the seamen were injured *while obeying an order to use the defective appliance.* (*Cricket S. S. Co. v. Parry, supra; Panama R. R. Co. v. Johnson, supra; Zinnel v. U. S. Etc., Corp., supra*).

It will be noted that all these cases arose in the same jurisdiction—the Circuit Court of Appeals for the New York or Second Circuit. The same is true of more than half of the Federal cases cited thus far. In determining the weight to be given these cases, then, we should turn to the most recent decisions of that jurisdiction upon the subject. One of these is

the case of *Scheffler v. Moran Towing & Transport Corp., Inc.*, 68 Fed. (2) 11 (C. C. A., 1933) and in that decision Judge Learned Hand expressly questioned whether a seaman assumed the risk of any unseaworthy condition had been decided.

"Our decision in Storgaard v. France and Canada S. S. Corp., 263 Fed. 545, held that the likelihood of injury was not a factor in liability for gear which was unseaworthy, and there would seem to be no distinction between that and a deficient complement. But though the holding certainly went so far, as will appear from the excerpt from the charge below, it is not wholly clear whether we meant to say that an owner was liable for all injuries arising from unseaworthiness, or whether we were invoking the doctrine announced the same day in Cricket S. S. Co. v. Parry (C. C. A.) 263 Fed 523; that is, that a seaman does not assume the risk of defective gear which he is ordered to use at sea. We now reserve the point, being content to leave it open for a case in which it can be more thoroughly presented: * * *"

In the most recent decision of that circuit it was held that even as to an unseaworthy condition—failure to provide lifelines in a storm, caused by the negligence of the ship and master—the seaman assumed the risk where he voluntarily ventured on deck in a storm while not acting under any direct order or command. *Johnson v. U. S.*, 74 Fed. (2) 703 (C. C. A., 2, 1935). The District Court was reversed, it having held that the risk was not assumed because of the unseaworthy condition of the vessel, (7 Fed. Supp. 133) and the libel was ordered dismissed.

Is the doubt expressed in the *Scheffler* case now resolved in favor of the majority holding elsewhere, by the *Johnson case?* It would seem so.

All circuits have, without question, applied the common law defense to cases brought under the Jones Act by stevedores or longshoremen. Although it is unquestioned that these men are seamen within the meaning of the Jones Act, *Warner v. Goltra, U. S.* 55 Sup. Ct. 46, 79, L. Ed. 8 (1935) (*supra*) yet, as was said in *Lloyd v. Hogan & Sons*, 219 N. Y. S. 750, 755,

"There is a line of cases holding that the defense of assumption of risk does not apply to injuries to a seaman on the theory that a seaman is, by the very nature of his employment, compelled to obey the orders of his superior officer. *The stevedore in this case, however, is not a seaman in fact.* He is included as a seaman in name only for the purpose of bringing him within certain munificient provisions of a law enacted for the protection of seamen. *As far as assumption of risk is concerned, it cannot be said as a matter of law, that he is in any different position than an injured railway employee coming under the provisions of the Federal Employer's Liability Act.*" (Italics ours).

Among the cases holding that the common law defense applies with all its force to stevedores are the following: *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923); *DeLuca v. Shephard S. S. Co. Inc.*, 65 F. (2) 266 (C. C. A. 2, 1933); *Long v. Silverline*, 48 F. (2d) 15; *The Hindustan*, 37 F. (2d)

932, Aff. 44 F. (2d) 1015; *Jeffries v. DeHart*, 102 Fed. 765 (C. C. A. 3, 1900); *Cunard S. S. Co., v. Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *Yaconi v. Brady & Gioe Inc.*, 246 N. Y. 300, 158 N. E. 876.

Recently the Second Circuit has gone so far as to extend the common law defense upon the same reasoning to the crew of tugboats, whose work and life is more like that of shore employees than that of seamen, as the term is usually used.

In *Skolar v. Lehigh Valley R. R. Co.*, 60 Fed (2) 893 (C. C. A., N. Y. 1932) the plaintiff, a fireman on defendant's tug, asserted that he was injured by reason of failure to have proper guard rails in the engine room, making the place a dangerous one in which to work. In holding as a matter of law the plaintiff assumed the risk, the Court used the following language:

"But regardless of whether the Court below was right in holding that there was no evidence of negligence, we think that assumption of risk was a complete defense to the first cause of action. The appellant concedes that this would be so were he a shore worker or a stevedore, but argues that a different rule applies to seamen. *Where a seaman is ordered to use a patently defective appliance or to perform an obviously dangerous act on shipboard, he is not held to have assumed the risk because his duty to obey orders overrides the consent ordinarily implied from knowledge of the danger.* See discussion in Holm v. Cities Service Transport Co., 60 Fed. (2) 721, decided by this Court

July 18, 1932. The case at bar does not fall within the reason of the rule. Here the plaintiff was an 'extra' fireman, employed at an hourly wage with the usual tour of eight hours a day on different tugs of the defendant. He was not supplied with a defective appliance nor ordered to perform a dangerous duty which fell to his lot rather than some other member of the crew because of a superior officer's selection. The danger arose from the mechanical design and constuction of the fire room. With this he was perfectly familiar and voluntarily took employment under those conditions, time after time on at least fifty prior occasions. He did not live on board but at his home in Jersey City; nor had he signed on for any definite voyage of this harbor tug, nor been employed to work on her rather than upon some other of defendant's vessels. Had he refused to go aboard the evening of November 5, when he sought the "Auburn" out at the dock, it seems extremely doubtful as to whether he would have been subject to the disciplinary penalties of an ordinary seaman. *Under such circumstances, an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be held applicable.* See the Marajah, 40 Fed. 784, 785 (D. C. S., N. Y.); Cunard S. S. Co v. Smith, 255 Fed. 846 (C. C. A. 2); Yaconi v. Brady & Gioe, Inc., 246 N. Y. 300, 306, 158 N. E. 876. The facts being undisputed, there was no issue for the jury as to assumption of risk." (Italics ours.)

The third case is *Sheffler v. Moran Towing & Transport Co., supra,* 68 Fed. (2) 11. The cook on defendant's tug while working on deck due to shorthandedness, was injured; the trial judge denied the defense of assumption of risk on the basis that the vessel was unseaworthy. On appeal, the Circuit Court

assumed that the tug was unseaworthy and that condition caused the accident, and denied recovery on the basis of assumption of risk.

"The libellant assumed the risk of the tug's shorthandedness. It is indeed true in general that a seaman at sea does not assume the risk of unseaworthiness, though it be known to him when he embarked (citing the Cricket S. S. Co., the Panama Railroad Co., and Zinnel cases, supra). This does not excuse him, however, when he has an alternative, (Holm v. Cities Etc., Co., 60 Fed. (2) 721; nor does it excuse those who, though strictly seaking they are seamen, are employed upon harbor craft on which they serve only during the day, leaving each night to go home and renewing their work every morning, like other short workmen. Such men are in the position of longshoremen or other casual workers on the water. (Skolar v. Lehigh R. R. Co., 60 Fed. (2) 893 (C. C. A. 2); the Scandinavia (D. C.) 156 Fed. 403), who assume all obvious risks, quite as though they were injured on shore. (Citing cases.) The libellant knew when the tug left that morning that he would be compelled to handle the lines for the absent deckhand, as he had done before. So far as this exposed him to any greater danger than his usual place aft, he acquiesced in the risk. This fulfills all the elements of an assumption of risk and prevents his recovery."

And in *Holm v. Cities Service Transportation Co.*, 60 Fed. (2) 721 (C. C. A., 2, 1932) it was clearly and definitely held that under the Jones Act assumption of risk may be a defense—and in that case it was held to be a defense where a seaman slipped on an oily patch on the deck. We quote at length:

"In Section 4 of the Federal Employer's Liability Act (45 U. S. C. A. Sec. 54) the defense of assump-

tion of risk is taken away only where the violation by a common carrier of a statute enacted for the safety of employees contributed to the injury or death of an employee. Otherwise, it is an available defense. Seaboard Air Line R. R. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 35, 58 L. Ed. 1062, L. R. A. 1915 C, 1, Annotated Cases 1915 B. 475.

"As there was here no violation of such a statute as is mentioned in the Federal Employer's Liability Act, the question of whether assumption of risk is ever a defense under the Jones Act is squarely presented.

"Where a seaman is injured when acting under orders, he does not assume the risk. Panama R. R. Co. v. Johnson (C. C. A.) 289 Fed. 964; Masjulis v. Shipping Board, 31 Fed.. (2) 284 (C. C. A. 2). The defense of assumption of risk is not available when a seaman so injured sues to recover because his duty to obey the order of a superior is so compelling that a rule of law based on the maxim 'violenti non fit injuria' cannot be applied. *Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place where he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land.* In States S. S. Co. v. Berglan, supra, (C. C. A., 41 Fed. (2) 456) it was recognized that a seaman assumed all the ordinary risks of his employment but not those created by the negligence of the persons in charge of the ship, since he could not quit the ship or control the action of his superiors. This was, however, but another application of the principle that a man does not assume a risk forced upon him. In Lynot v. Great Lakes Transportation Corp., 202 App. Div. 613, 195 N. Y. S. 13, it was held that assumption of risk was not a defense under the

Jones Act. This result was reached by reasoning that the defense is not a part of the general law of maritime torts and that the Jones Act works no change in that respect, since the defense is not created by the Federal Employer's Liability Act, but only permitted under common law principles except to the extent forbidden by Section 4 of that statute. Reliance was put on Lafourche Packet Co. v. Henderson, (C. C. A.) 94 Fed. 871, to show that assumption of risk was not a part of the general maritime law. The treatment of assumption of risk in the Lynott case is somewhat too broad, since it leaves out of account that element of coercion which is the basis for the modification of the common law rule as found in the maritime law. Lafourche Packet Co. v. Henderson, supra, makes this feature controlling. It was the principle upon which the decision turned. Henderson was working under orders. That a seaman does not assume the risk of injury caused by the unseaworthiness of the ship or defective appliances even though known to him, Cricket S. S. Co. v. Parry (C. C. A. 263 Fed. 523) is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they cannot quit, and ship owners cannot relieve themselves of liability to their seamen for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. *But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him. To this extent it has long been a part of the maritime law that seamen do assume the obvious or known risks of their employment.* The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955; States S. S. Co. v. Berglan (C. C. A.) 41 Fed. (2) 456; The Scandinavia (D. C.) 156 Fed. 403." (Italics ours)

With but few exceptions, all of the decisions of the Circuit and District Courts, and without exception, all of the decisions of this Court indicate that the defenses of assumpion of risk and the other common law defenses are equally a part of the maritime law, except insofar as the exigencies of maritime life require an alteration; and so far as assumption of risk is concerned, the only alteration required is that made necessary by the stern duty of obedience upon the part of a seaman to orders from his superior officers. When that factor is removed, so far as assumption of risk is concerned there is no distinction between maritime and common law assumption of risk; and the last cited cases from the Second Circuit illustrate that where the reason for the distinction fails, the distinction also fails.

2. THE FACTS

Bearing the principles stated in the above cases in mind, let us look at the facts and see just what risks are alleged to have contributed to the injuries of Anelich, which are assumed by him.

His work required him to handle a heavy line upon a drum which revolved at a considerable speed. The line, coming directly out of the sea, was always wet, and the deck on which he stood was always wet from

it. (R. 232.) Certainly the risk of getting caught in the twisting line, should it snarl or become kinked by his lack of diligent handling—and that is how Pete Matiaco, the only witness who saw the accident, said it happened (R. 312)—was a risk inherent in the work, obviously a part of it, as much as the danger of falling from aloft is a part of a sails trimmer's duty. Just as plainly the danger of slipping on the wet deck and falling into the winch was an inherent and incidental risk of the employment. Such risks, it is now apparently conceded by Respondent, are assumed; the lower Courts, however, refused to allow the defense even as to these simplest and most natural risks of the employment. All of petitioner's requested instructions on the subject were refused, (R. 360, 12) no instruction was given on the subject, and the trial court held that assumption of risk was not available in any respect.

These risks were incidental and usual in Anelich's employment; he was an experienced man, knew and appreciated the dangers of becoming in some way entangled in the line, and assumed those dangers. The danger was open and obvious. Certainly under the law as laid down by this court in *The Iroquois*, and by the unanimous holdings cited, petitioners were entitled to have the jury instructed that such dangers were assumed by Anelich.

It was one of plaintiff's theories that the clutch on the winch was worn out and would not stay in gear, requiring the use of a stick to hold the clutch lever in place; that by reason of the presence of the stick, the lever could not be thrown in to disengage the clutch and stop the winch in time to avoid the injury. Let us assume for this argument that the jury was entitled to find that the stick was in place and that it rendered the winch defective, such defect causing the injury. This is said to constitute unseaworthiness of the vessel which a seaman does not assume; and the ruling of the lower court in that respect constitutes the most contested question in the case.

The lever, as shown in the pictures (Plaintiff's Exhibits A and F) was within two feet of where Anelich stood while taking in the line; the stick said to have been used hung from a string on the corner of the winch next to him and was inserted, if at all, from his side; he was one of the two men in charge of the winch; he had performed the same operation the same way 150 times, and if the stick was needed on one occasion, it was certainly as necessary on any other; he was an experienced winchman and fisherman; he was not an ignorant alien but an intelligent man in the prime of life who had once owned his own boat. (R. 69.) If the stick was in place on the day in question he must have seen it, and knew and appre-

ciated the dangers, if any, incident upon its use. Certainly the jury would be entitled to infer such knowledge and appreciation from the facts just related.

The simple situation of a man who works upon a simple mechanical device, without complaint of any sort, performing the same operation time after time, is presented by this case. It is difficult to prove the extent of the knowledge a dead man possessed, but a decedent is presumed to be of normal intelligence and to know and appreciate the dangers which an ordinary prudent man in his position would see and grasp. *Northwestern Pac. R. R. Co. v. Bobo*, 290 U. S. 499, 54 S. Ct. 263, 78 L. Ed. 462 (1932).

Under the Employer's Liability act, the employee assumes "when obvious or fully known or appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees." *Toledo St. L. & W. R. R. v. Allen*, 276 U. S. 165, 169 (1928). Respondent brings this action solely by virtue of the Employer's Liability Act made applicable by the Jones Act, and assumption of risk should be an available defense to this obvious risk.

There is no reason in law or in fact why Anelich was not in the same position, so far as this defense is concerned, as a railway employee. He was not acting under orders of any kind. In fact, there was

no marine discipline on the "Arizona" or throughout the fishing fleet. Anelich was not subject to punishment for disobedience of orders; he could quit any time he wished and receive his earned pay with no forfeiture. At least once each day one of the buyers came alongside, and each night the boat anchored at shore. Once a week the crew received a day's holiday ashore. The men were really joint venturers, each receiving his share of the catch. (R. 326, 33.) Where is the rigid iron discipline of the sea, requiring instant obedince and days of enforced labor with the ship's appliances? Surely here, as in the *Skolar* case (60 Fed. (2) 893) "an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be held applicable." Even the Second Circuit, when denying the defense as to a seaman in the usual sense of the word, would have granted it without question as against the man in Anelich's position, who, like a stevedore, is considered a seaman for the benefits of the Jones Act but whose work, for all practical purposes, is no different from that of a shore employee. *DeLuca v. Shepard S. S. Co., Inc.*, 65 Fed. (2) 566, (C. C. A. 2, 1933); *Skolar v. Lehigh Valley Ry. Co.*, 60 Fed. 893; *Scheffler v. Moran Towing & Transit Co.*, 68 Fed. (2) 11 (C. C. A. 2,); *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923).

Petitioner's rights were seriously impaired and a defense given to them by Federal enactment was taken away by the state courts when the defense of assumption of risk was refused. The instruction requested (No. 7, R. 12) properly stated the doctrine under the decisions of the Washington courts, *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113 (1928), and of this Court under the decisions cited, *supra.*

These arguments apply equally to the charge that petitioners were negligent in having an engineer who did not speak Slavonian. This seems to petitioners absurd; a cry of pain is the same in any language, and at any rate the engineer received his orders direct from the captain.

Another risk assumed by Anelich was the danger, in case of injury, of having such injuries treated by primitive first aid methods and of delay in securing medical attention. These are risks incidental to and a part of the employment of every man who works away from centers of civilation ,and are exactly the type of risk referred to in *The Iroquois*, 194 U. S. 240, *supra*, where this court said:

"Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is pecu-

liarly applicable to the case of seamen." See also, *The Cricket*, 71 Fed. (2) 261 (C. C. A. 9, 1934).

Petitioners were charged with negligence in their care and treatment of the injured man, and with negligence in securing him medical attention; and in defense, assumption of risk was available according to the holdings of the Court.

B.

THE DEFENSE, ON THE ADMITTED FACTS, IS A COMPLETE DEFENSE AS A MATTER OF LAW.

That the denial of the defense was error seems to petitioners inescapable. There can be no question but that the jury, had they been advised of petitioners' defense, had before them ample facts to justify a verdict for the defendants on the basis of assumption of risk. Petitioners strongly and sincerely contend that the admitted facts show, *as a matter of law*, that the danger which caused Anelich's injury and death was one which he assumed and one which was always present during the 150 times the operation had been repeated.

We have fully presented the facts heretofore; repetition would be useless extravagence of time. Respondent concedes the essential facts — (Brief opposing certiorari p. 5).

"Anelich became injured in the following manner: A part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to avoid it, but failed, and then his left leg got caught in the line * * *."

Caught in a line which he alone handled and which he allowed to became entangled; drawn into the winch drum revolving at 90 R. P. M. (R. 249) drawing in two or three feet of line at every revolution; drawn in before any other member of the crew had time to move prior to the instantaneous disaster: What risk could be more incidental to and inherent in the work Anelich did? Truly Anelich was injured by an incidental risk of his employment, and whether the stick was in place or not, the risk remained, the full extent of which he must have appreciated.

Were the stick in place, Anelich must be held to have seen and appreciated the obvious danger. His experience was as great as that of the master and owner of the vessel, and his knowledge and appreciation of the perils was as extensive.

We submit that not merely did the Court err in denying your petitioners the defense of assumption of risk, in any form whatsoever, but that the defense is, as to petitioners' responsibility for the original injury, a complete defense as a matter of law.

II.

THERE WAS NO NEGLIGENCE ON THE PART OF PETITIONERS CONTRIBUTING PROXIMATELY TO THE ORIGINAL INJURY TO ANELICH.

It was the theory of the plaintiff's case that the clutch transmitting power to the winch was so worn out and defective that it would not stay engaged unless the clutch lever was braced or locked in position by a stick, forked at one end and resembling a boot jack, which hung beside the winch on a string (R. 240). The argument proceeded that because the stick was in place the lever could not be thrown in to stop the winch, Anelich, after he became entangled in his line, was pulled into the winch. In support of this theory evidence was introduced as to the existence of the stick and the worn condition of the clutch (R. 106, 130, 337). *There was no evidence that the stick was in place on this occasion.*

Men experienced in marine engineering testified that the clutch required nothing to keep it in mesh when the winch was under a load, such as the purse line, as a result of their examination and actual use of the machine (R. 193, 206, 221). There was further testimony that it was common to use such a stick when a winch was to operate steadily for a

considerable time under a light load, as under those conditions such a clutch tends to shake and gradually slide out of engagement (R. 209, 240, 291, 298). *Further, there was positive testimony by the crew that the stick was not used when the purse line was being hauled in and that it was not in place at the time of this accident* (R. 88, 236, 296).

Peter Mardesich, master of the vessel, testified that when he heard Anelich shout he jumped for the clutch handle to shut off the winch and became entangled in the twisting loops of the line. At that time the stick was not in place. (R. 236.) He stated that he made the stick himself for use in rough weather (R. 240) and that it hung beside the winch all season, was never used when there was a load on the winch, and was not used on the day in question. (R. 241.)

George Brajcich, the forward winchman, doing the same work as Anelich, testified that on the day in question the board was not used; it was used when there was a big swell, but it was not needed when pulling in on the purse line. (R. 296.)

Antone Mardesich said the board was not in place on the day in question. (R. 88.)

The rest of the crew were not concerned with the details of the winch and knew nothing about the stick.

The expert testimony as to the condition of the winch clutch disagreed completely, as so frequently occurs. (R. 106, 130, 337, 193, 206, 221.) The men who used the winch daily, however, testified that it needed nothing to keep it in gear; (R. 88, 197, 198, 236, 296) and they testified positively that nothing was used on the day in question.

This definitely disposes of the contention that the stick was in place; as the trial court said before hearing the defendants' testimony:

"Now I do not recall one word of direct testimony that this stick or brace was in fact and actually in use at the time of the operations being carried on, and at the time of the deceased's injury." (R. 202.)

The clutch did not slip, so the lengthy discussions of the condition of the clutch are irrelevant; had the clutch slipped the winch would have ceased turning and Anelich was injured because it continued to turn.

But, said the State Supreme Court, (R. 20) there is circumstantial evidence that the stick was in place so the lever could not be operated; had it not been in place, the owner of the vessel would have used the lever to stop the winch instead of shouting to the engineer. The reference must be to Antone Mardesich; Peter did try to shut off the winch by means of the clutch lever but was entangled by the loops of the snarled purse line. (R. 236, 250.) No one else was near the winch.

In this connection it should be noted that in respondent's brief in opposition to certiorari, at p. 12, it is said that plaintiff's case rested, at the trial, solely on two charges of negligence, one for failure to furnish proper appliances, and the other for a single act of negligence on the part of the owner in failing personally to stop the winch. In the interests of accuracy, it must be pointed out that the second charge of negligence was not made at the trial; there is no such allegation in the complaint, (R. 1) and the contention was not made at the trial that Antone Mardesich could and should have thrown the lever in, to stop the winch. In fact, respondent's two contentions were (1) that the winch could not be shut off because the stick was in place and (2) that the engineer was not in the engine room and had to go below to disengage the clutch and stop the winch. The latter contention was refuted by every witness who testified on the point, for the entire crew agreed that the engineer was at his post below when the accident occurred and that he stopped the winch immediately. (R. 191, 236, 295, 308, 312, 315, 320.) The contradictory nature of respondent's present position is, of course, obvious; if the stick was in place, as respondent contends then Mr. Mardesich could not have thrown in the lever. This new contention is drawn from the statement of the state court referred to, and was never made on the trial of the case.

What is the value of this "circumstantial evidence" and of this charge of negligence?

The only evidence as to how close Antone Mardesich was to the lever was given by him, to the effect that he was eight or ten feet from where the decedent was standing, with the coils of the forward purse line between them. (R. 86.) Regardless of his position, however, the evidence is conclusive and undisputed that he was at that moment handling the line from the boom which carried the full weight of the net and the heavy leads suspended over the deck, above George Brajcich, who was at the davit, and above the man in the skiff below. To release that line instantly would have endangered their lives; he made his line fast about the winch bitt as soon as he could and by that time the winch was stopped. George Brajcich testified that Antone Mardesich was handling the line from the boom to pull up the net. (R. 299.)

The situation was told by Peter Mardesich as follows:

"Q. Come over and show us the position of those rings and point out what would happen had your father let go of that rope. I want him to illustrate that. You pull it up to where it was at the time this acciden happened as you recall it. (Exhibiting the model.) That was on for the purpose of lifting the rings?

A. Yes.

Q. And what would have happened if that would have dropped?

A. Everything would have gone back in the water.

Q. And this is the leads here?

A. Yes. This would have dropped down on the men working there.

Q. What about the man working on these blocks?

A. It would probably have hit him." (R. 252.)

Antone Mardesich, referring to the model, Plaintiffs' Exhibit C, testified as follows:

"I was here myself on this side of it and I was holding this line up. I was holding this one here to make the operation here; this was on the winch here and then when he yelled, then is when we all yelled to stop the machine and the engineer immediately stopped the machine and when he stopped the machine I put that right on this like this so that I could hold it so this one could come down; that is about a ton or a ton and a half of weight on this here, and won't let this down. This side was released off of here and when he got the foot caught I don't know how his foot got caught in here; I hold this weight right on this like that so it won't come down and fall down, it would hit somebody because the boys was right under here, because that is their job . If I let go of this when he stopped the winch, then that weight pulls back the winch, that power." (R. 81.)

Even if we speculate (there is no evidence) on whether he was close enough to reach the lever, Antone Mardesich could not release the line he was handling without endangering the lives of other members of the crew; to hold him negligent because

he did not drop the line he was holding, with the safety of others depending upon it, is indeed a travesty on justice.

There is no evidence, circumstantial or otherwise, that the stick was in place. There is positive evidence that it was not. The clutch did not slip. The winch was stopped as soon as possible by the engineer who was at his post below. Petitioners submit that there is no evidence of negligence on their part contributing to the injury. "If upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed." *Toledo St. L. & W. R. R. Co. v. Allen*, 276 U. S. 155, 159 (1928); *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391 (1933).

"By the Federal Employers Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation, by rail; and all state laws on that subject were superseded. Second Employers' Liability Cases, 223 U. S. 1, 55; Seaboard Air Line v. Horton, 233 U. S. 492, 501. The rights and obligations of the plaintiff depend upon that Act and application of principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record and if it is found, as a

matter of law, that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or conributed to cause the death is without any substanial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. Pawling v. U. S., 4 Cr. 219, 221; Patten v. Tex. & Pac. Ry. Co., 179 U. S. 658, 665; Looney v. Metr. & Rf. Co.. 200 U. S. 480, 488; St. L. & Iron M. & N. Ry. Co. v. McWhirter, supra, 252; St. Louis-San Fran. Ry. v. Mills, ante, p. 344." *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 474, 478, 46 S. C. & 564, 70 L. Ed. 104 (1926).

III.

THERE WAS NO NEGLIGENCE IN THE CARE AND TREATMENT AFFORDED THE INJURED MAN BY PETITIONERS.

Respondent's case was based on two causes of action, (1) that the petitioners were liable for the original injury to Anelich and (2) that the petitioners, regardless of liability for the original injury, were responsible for Anelich's death because of negligent treatment and care furnished him after the injury. Specifications of error 1 and 2 deal with the first cause of action; Nos. 3 and 4 with the second cause of action.

The duty which the maritime law places upon the master and owners of a vessel to furnish proper medical attendance and treatment has been stated by this Court in *The Iroquois*, 194 U. S. 240, (*supra*) as follows:

"The duty to provide proper medical attendance and treatment for seamen falling ill or suffering injuries while in the service of a ship has been imposed upon the ship owners of all maritime nations. * * * What is the measure of the master's obligation in cases where a seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own particular facts that the rule laid down in one may afford little or no aid in determining the matter, depending upon a different state of facts. * * * Each case must depend upon its own circumstances, having reference to the seriousness of the injuries, the care that could be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the ship owner, the direction of the wind and the probability of its continuance in the same direction, and the fact of whether a surgeon is likely to be found with competent skill to take charge of the case. * * * With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman of the geography and resources of the country. * * * Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is peculiarly applicable to the case of seamen."

The Iroquois is without doubt the leading case upon the question and as is said therein, reference to

other cases is of little value because of the differing facts upon which the decision in each case must depend. All decisions agree, however, that the master is held only to the exercise of reasonable judgment under the circumstances and if that judgment is conscientiously exercised, the master and vessel are not responsible. *The Vanderduyn*, 261 Fed. 887 (C. C. A. 2, 1919); *The Governor*, 230 Fed. 857 (D. C. 1915).

Measured by the standard of care as set forth in these cases, certainly it cannot be said that on the undisputed evidence set forth, the masters and owner of the "Arizona" should be held negligent in their treatment of the wounded man or in the course of conduct followed in securing medical aid for him. It was asserted that the injured man should have been taken to one of several other ports named; it clearly appeared from the evidence that Friday Harbor was the nearest port at which medical attendance could be obtained (R. 330-332) and as was said in *The Iroquois*, the mere fact that plaintiff named several possible ports indicates that there was no one other course which the jury could find as being the only reasonable course under the circumstances. It was also asserted that airplane service should have been called from Seattle, and considerable evidence was allowed as to available airplane service (R. 167

et seq.). Not only did the evidence show, however, that the defendants did not know of the available airplane service and had never heard of it (R. 327), but it also appeared without dispute that the earliest time at which a telephone could be reached was 9:40, more than an hour after the accident (R. 279 281) and that a round trip from Seattle to Friday Harbor could not have been made in less than two hours actual flying time (R. 178). It clearly appears, therefore, that Mr. Anelich received competent medical attention by Dr. Sturdevant at Friday Harbor at 10:30, more than an hour before he could have received such attention had the defendants followed any other course suggested by the respondent here; and that such treatment as Dr. Sturdevant gave him was the standard treatment to be given at the time a doctor first sees such a wound; it is then necessary to allow the patient to rest for a considerable period to recover from shock before any operative measures are taken (R. 22, 166).

The fishermen knew nothing of charter airplane service; they did know of the Coast Guard cutter. The Court below concedes that petitioners "made every effort to contact the Coast Guard (*which was the usual method of getting injured seamen from that locality to the Marine Hospital*) * * *." (R. 24, Italics ours.) That is the case not only in the Puget

Sound district but in every maritime region of the United States. Medical attention and the Coast Guard are the first thoughts in case of injury. Is a jury of landsmen, knowing nothing of the conditions of the sea, to be allowed in every case where the Coast Guard is called, to hold the master guilty of negligence in failing to call an airplane? The lower Courts' holding not only injected an absurd and irrelevant matter into this case, but opens the way to litigation in practically every case in which a seaman is injured upon a fishing or other small vessel when the Coast Guard cutter is called.

Negligence is also charged in the failure of the master of the vessel to treat and cleanse the wound of Anelich on board the vessel. The defendants Mardesich had had no first aid training; (R. 238) both felt the first consideration was to get him to a doctor. (R. 83, 241.) As to possible treatment by use of the first aid kit, Dr. Teufel, who treated Mr. Anelich at the Marine Hospital in Seattle, testified that such dressings were of some, but a very limited, value. (R. 157.) Drs. Teufel and Trask agreed that it would be absolutely inadvisable for an inexperienced person to attempt to cleanse a wound of that extent (R. 161, 269, 271) and to care for such an injury is classed as a major operation. (R. 269.) Dr. Trask testified that it was preferable to allow the clothing

to remain on the wound, rather than to remove it and leave the wound exposed, or to dress it, unless additional infection is guarded against by sterilizing the dressings as well as the hands of the first aid operator. (R. 271, 272.) Dr. Trask stated that the most important thing in such a wound was to stop bleeding, which was done by a tourniquet. (R. 271.)

The doctors all agreed that proper and immediate first aid treatment would lessen to some degree the chances of infection; but as Dr. Trask pointed out, treatment by an inexperienced man might increase infection (R. 271); and Drs. Sturdevant and Trask asserted that in an extensive wound of this sort application of an antiseptic and dressings without cleansing and cutting away dead tissues, would have little effect on germs already in the wound, and would protect against subsequent infection only. (R. 263, 270.)

Had the petitioners tried to clean up the wound, it might well have resulted in their being charged with negligence for doing so and thus increasing infection and shock. The action of the petitioners must be judged by the circumstances in which they found themselves and by the knowledge which they possessed, and they cannot be expected to have the resource, knowledge and training of the masters of larger ves-

sels. It is conceded by the Court below that they did all that they thought of; and as a matter of law petitioners feel that they thought of and did all that men in their position reasonably could be expected to do.

Upon the authority of the decisions of this Court, when the facts do not justify the verdict, the case should be reversed. We respectfully submit that upon the facts of this case, that course is indicated.

IV.

THERE WAS NO NEGLIGENCE OF PETITIONERS WHICH WAS A REASONABLE AND PROXIMATE CAUSE OF SEPTICEMIA RESULTING IN DÉCEDENT'S DEATH.

This phase of the case is entirely removed from the first two specifications of error, and the question of liability for the original injury is not involved.

As just urged, petitioners take the position that there was no actionable breach of any duty owed to Anelich. Even if the State Courts were correct in holding that perhaps these fishermen should have attempted to cleanse and repair the wound, or should have known of and called airplane service, however, there is no evidence that the treatment which Anelich actually received was a proximate cause of the septicemia causing death.

The injury alone could not have resulted in death, and it is charged that the treatment which he received did.

Four doctors gave testimony at the trial. *Each testified that in his judgment the germs which finally resulted in death got into the wound at the moment of the original injury.* (Dr. Teufel, R. 160; Dr. Laige, R. 164; Dr. Sturdevant, R. 262; Dr. Trask, R. 270.) All four agreed that it was impossible to say that any treatment would have prevented the development of septicemia in the wound; and Dr. Sturdevant and Trask stated the percentage of cases developing septicemia from similar wounds was high, (R. 267) perhaps fifty or sixty per cent (R. 269). Dr. Teufel stated that from the symptoms of the case as they developed, he would judge that bacteria got in the wound at the time of the injury, and were carried through the blood stream, showing up as systemic poisoning two or three days later (R. 161), as there was no localized infection. (R. 155.)

If Mr. Anelich had received surgical and hospital treatment *immediately* following the accident, the most likely thing on the medical testimony, is that under these circumstances systemic infection would have developed. Prompt cleansing and repairing of the wound would have been beneficial, to be sure, but

that was not a layman's task; and it cannot be said, with any degree of certainty, that even such treatment would have saved the life of the injured man.

Upon this evidence the jury could do no more than speculate or guess as to whether negligent treatment caused the septicemia and resulted in death, or whether the septicemia developed as an inevitable result of the infection of the wound immediately upon the injury.

In this connection, the case of *Cortes v. Baltimore Insular Line* is in point. A seaman on defendant's ship en route from Florida to New York became ill shortly after leaving Florida. Four days later, having passed several large ships en route, the vessel arrived in port, and twenty-four hours later he was taken to a hospital, dying shortly thereafter of pneumonia. His treatment on board had been careless and neglectful. The lower Federal Courts held that such a cause of action was not within the scope of the Jones Act. On appeal, their holding was reversed, and the case remanded for a new trial. *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 77 L. Ed. 368, 53 S. Ct. 173 (1932).

On the new trial, it developed that he might have had any one of four types of pneumonia, one of which averaged a fatality of from 70% to 90%. The

doctors testified that although proper treatment on board would have increased his chances of recovery, yet, as in the instant case, it was entirely possible that he would have died with the best of care.

The Circuit Court of Appeals of the Second Circuit (66 Fed. (2) 526 (1933), denied recovery, as follows:

"Granting that the jury could have found negligence in treatment, was there evidence from which they could have found that such negligence was the cause of death? We think not * * *

"If he had a disease so fatal that the chance of recovery was only 1 to 3 out of 10 even with the best of treatment, it seems to us pure speculation on the part of the jury to find that the failure to land him at an intermediate port, or to get him to a hospital more promptly after arrival, or the failure to give him more careful treatment aboard ship, was the cause of his death * * *. (The Court pointed out that doctors testified that his chance of recovery would have been increased by reasonable medical treatment on board.) But *that is scarcely equivalent to testimony that with reasonable certainty the defendants' neglect can be said to have caused the seaman's death.* * * *

"Because on this record a verdict for the plaintiff would be purely speculative, we think there was error in submitting the case to the jury. The causal connection between the defendants' breach of duty and the resulting injury or death must not be left to mere conjecture. Thorkeldson v. Nicholson, 154 Minn. 106, 191, N. W. 269, 220; C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 478, 46 S. C. 564, 70 L. E. 10, 11; Ketterer v. Armour & Co., 247 F. 921, 931, L. R. A. 1918 D. 798 (C. C. A. 2); N. Y. Cent. R. Co. v. Grim-

stad, 264 F. 334 (C. C. A. 2); cf Harris v. Penn. R. Co., 50 Fed. (2) 866 (C. C. A. 4)." (Italics ours.)

The *Coogan* case referred to contains the following:

"By the Federal Employers Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation, by rail; and all state laws on that subject were superseded. Second Employers' Liability Cases, 223 U. S. 1, 55; Seaboard Air Line v. Horton, 233 U. S. 492, 501. The rights and obligations of the plaintiff depend upon that Act and application of principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record and if it is found, as a matter of law, that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. Pawling v. U. S., 4 Cr. 219, 221; Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, 665; Looney v. Metr. & Rf. Co., 200 U. S. 480, 488; St. L. & Iron M. & N. Ry. Co. v. McWhirter, supra, 252; St. Louis-San Fran. Ry. v. Milles, ante, p. 344." *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 474, 478, 46 S. C. 564, 70 L. Ed. 104 (1926).

The latest case on this point is *Northwestern Pac. Ry. v. Bobo*, 290 U. S. 499, 78 L. Ed. 462, 54 S. Ct. 263 (1934):

"Our decisions clearly show that '*proof of negligence alone does not entitle the plaintiff to recover* under the Federal Employer's Liability Act. *The negligence complained of must be the cause of the injury.* The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.' Atchison T. & S. F. R. Co. v. Toops, 281 U. S. 351, 355, 74 L. Ed. 896, 900, 50 S. Ct. 281; Chicago M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; Atchison T. & S. F. R. Co. v. Saxon, 284 U. S. 458, 76 L. Ed. 397, 52 S. Ct. 229." (Italics ours.)

The only case in any degree supporting the opinion of the Washington Court is the District Court opinion in the *Cortes* case upon its third trial, 6 Fed. Supp. 604, which we submit is contrary to the Circuit Court's decision and to the holdings of this Court. Even that decision, however, recognized that a casual connection must be established and that the wrongful act must have lessened *substantially* the decedent's chances for recovery. It must be remembered that the *Cortes* case offers an example of the most flagrant neglect; the man was seriously ill with pneumonia and medical care was not given him for several days. Application of the doctrine there laid down necessi-

tates no different result here, however, as there is no evidence of neglect of that sort, nor is there any evidence of a *substantial* lessening of his chances for recovery. Blood poisoning caused his death; and blood poisoning more often than not results from such a wound. From his death alone then, no inferences can be drawn. Certainly no doctor testifying in the case was willing to state that his chances of recovery were substantially lessened by the treatment afforded him by the appellants.

The Circuit Court decision, however, is in accord with the decisions of this Court, requiring that a jury's verdict must rest upon facts and not upon speculation, guess or conjecture. In the instant case, as has been pointed out, all medical testimony agreed that in all probability the wound became infected at the time of the original injury; and it was shown that in wounds such as this septicemia develops in more than half of the cases. If such a percentage arises from the average case in which medical attention is not delayed for any length of time, what would be the percentage under circumstances in which dirty clothing is ground into the wound and an enforced delay of two hours exists before medical attention can be reached? Under such circumstances, the jury can do no more than guess when it states that failure to cleanse the wound on board the vessel, or failure to

use an airplane, caused the blood poisoning which resulted in the death of Anelich. Each of the doctors testified that in their opinion the infection got into and was carried through the blood stream a the time of the accident, and even had hospitalization followed *immediately*, it was entirely possible that death would have ensued.

There is absolutely no testimony that negligent treatment, if any, on the part of the defendants can be said *with reasonable certainty* to have been a proximate cause of the decedent's death; on that phase the jury had grounds only for speculation and conjecture, and the court below was in error in holding that a jury question was presented (R. 22).

CONCLUSION

We may summarize the arguments, which we have made at length, somewhat as follows in concluding this brief:

Assumption of risk has always been a defense under both the maritime and the common law. In its maritime application the defense has been modified only so far as the stringent duty of obedience upon the seaman necessitates; and when that duty is no greater or urgent than the duty upon an ordinary shore employee, then between the maritime and the

common law phases of the defense there is no distinction. Anelich was not acting under orders, was under no greater duty of obedience, and was in no different position than any shore employee. The action brought by respondent is based solely upon the common law phase of the defense, however, inasmuch as it is brought under the Federal Employer's Liability Act, codifying and modifying the common law rules, and made applicable to respondent by the Jones Act.

Anelich was injured by risks which were open, obvious and apparent and were, therefore, assumed by him under the maritime law, under the common law, and under the Jones Act. The trial court and the State Supreme Court were in error, therefore, in holding that the defense was not available to your petitioners and by the denial of that defense, a grave injustice has been done; further, petitioners respectfully submit that as a matter of law, Anelich assumed the risk of being injured as he was.

Petitioners further submit that upon the question of the petitioners' negligence contributing to the original injury, a jury could only speculate and guess; and that upon the issue of negligent treatment and care of the injured man there was a complete failure of proof. Further, it is submitted that there is no evidence that the care and treatment furnished

by petitioners was a proximate cause of the septicemia causing Anelich's death Upon the issues of negligence, the lower courts permitted the jury to speculate as to whether the injuries suffered were caused by the negligent acts of the employer, and whether the resulting death was caused by such negligence.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to correct the errors of the Supreme Court of Washington heretofore specified; and that the decision of the Supreme Court of the State of Washington under review should be reversed, in the interests of justice.

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